THE DISTORTED ADVERSARIAL POSTURE OF TITLE VII AFFIRMATIVE ACTION CHALLENGES

The recent Supreme Court decision in *United Steelworkers v. Weber*,[1] upheld the lawfulness under title VII of the Civil Rights Act of 1964 [2] of private, voluntary, race-conscious "affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories." [3] The Court did not decide, however, what constitutes a "permissible" affirmative action plan; [4] nor did it consider the lawfulness of affirmative action in public employment,[5] court-ordered affirmative action,[6] affirmative action instituted via consent decrees,[7] or affirmative action taken to comply with federal administrative agencies' guidelines issued under Executive Order 11,246 [8] or the guidelines of the Equal Employment Opportunity Commission.[9] Moreover, there was sharp disagree-

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[1] 443 U.S. 193 (1979).

[2] 42 U.S.C. §§ 2000e-2000e-17 (1976, Supp. I 1977 & Supp. II 1978).

[3] 443 U.S. at 209 (footnote omitted).

[4] "We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans." *Id.* 208.

[5] The majority opinion in *Weber* makes it clear that the Court limited its holding to the lawfulness of certain affirmative action plans in private industry: "We conclude, therefore, that the adoption of the Kaiser-USWA plan for the Gramercy plant falls within the area of discretion left by Title VII to the private sector . . . ." *Id.* 209. Notwithstanding this caveat, the Sixth Circuit recently relied on *Weber* to uphold a race-conscious affirmative action plan for city police officers. Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3558-59 (U.S. Jan. 10, 1980) (No. 79-1080). Additionally, the United States Department of Justice has argued that the *Weber* decision supports the lawfulness of race-conscious affirmative action in public employment: "Under Title VII, private and public employers are subject to the same standards. For that reason, a voluntary affirmative action plan adopted by a public employer is as lawful as that of a private employer." Second Supplemental Brief for Appellant at 11, United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980) (footnote omitted).

[6] Consideration of this question was expressly deferred by the Court: "[W]e are not concerned with what Title VII requires or with what a court might order to remedy a past proved violation of the Act." 443 U.S. at 200.

[7] *See* note 6 *supra*; Carson v. American Brands, Inc., 606 F.2d 420, 430-32 (4th Cir. 1979).

[8] 30 Fed. Reg. 12,319 (1965), *as amended by* Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967), *and by* Exec. Order No. 12,086, 43 Fed. Reg. 46,501 (1978). This question was also reserved by the Court: "Nor need we consider petitioners' contention that their affirmative action plan represented an attempt to comply with Exec. Order No. 11,246 . . . ." 443 U.S. at 209 n.9.

[9] The guidelines appear at 44 Fed. Reg. 4,422 (1979). They were not mentioned in *Weber*, although the United States cited them as authority for the lawfulness of the challenged affirmative action plan. Brief for the United States and the Equal Employment Opportunity Commission at 40-41.

ment in *Weber* between the majority and the dissent regarding the proper interpretation of the language[10] and legislative history[11] of title VII. This disagreement signals the continuing unsettled state of affirmative action law and the need for a critical examination of the adversarial process in title VII affirmative action challenges.

This Comment argues that courts have been inadequate dispute-resolution mechanisms in cases involving affirmative action issues. Part I will discuss the collusive aspect of affirmative action challenges, which typically assures exclusion of probative evidence, because none of the usual parties—white male employee, employer, and union—has any incentive to introduce evidence of past discrimination. As an illustration, this part will examine the potentially critical facts in *Weber* that were inadequately treated or ignored by the lower courts hearing the case.[12] Finally, as a solution to the deficiencies inherent in the adversarial process of affirmative action challenges, part II will propose that minority bene-

[10] The majority was unable to discern any congressional intention to prohibit private initiatives toward establishing voluntary, race-conscious affirmative action programs: "[W]e cannot agree with respondent that Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve. . . . Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action." 443 U.S. at 204, 207 (footnotes omitted). The dissenters, on the other hand, argued that the legislative history clearly demonstrated that members of Congress "recognized that Title VII would tolerate no *voluntary* racial preference, whether in favor of blacks or whites." *Id.* 245 (Rehnquist, J., dissenting) (emphasis in original).

[11] The majority rejected a strictly literal reading of the statute, *id.* 201, insisting that the statute's prohibition of racial discrimination "be read against the background of the legislative history of Title VII and the historical context from which the Act arose." *Id.* The dissenters, on the other hand, contended that the "plain language" of the statute "flatly prohibited" the practices in the case. *Id.* 228 (Rehnquist, J., dissenting).

[12] Both the district and circuit courts held that a finding of past or present discrimination would be required to validate an affirmative action program challenged under title VII. Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761, 766-67 (E.D. La. 1976), *aff'd*, 563 F.2d 216, 224 (5th Cir. 1977) *rev'd*, 443 U.S. 193 (1979). The Supreme Court did not require such a finding to uphold the affirmative action plan challenged in *Weber*. Instead, the Court took judicial notice of the traditional exclusion of blacks from crafts "on racial grounds." 443 U.S. at 198 n.1. The Court emphasized the narrowness of its holding, however, and indicated that evidence of discrimination may be relevant in determining when a specific affirmative action plan is permissible. *Id.* 200, 208. The lower courts that have interpreted *Weber* have continued to examine evidence of discrimination and racial imbalance in cases involving affirmative action challenges. *See, e.g.*, Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3558-59 (U.S. Jan. 10, 1980) (No. 79-1080); Shaw v. Library of Congress, 479 F. Supp. 945 (D.D.C. 1979); Tangren v. Wackenhut Servs., Inc., 480 F. Supp. 539 (D. Nev. 1979); Price v. Civil Serv. Comm'n, 22 Empl. Prac. Dec. ¶ 30,589 (Cal. S. Ct. 1980).

ficiaries of affirmative action plans be compulsorily joined by the courts when such plans are challenged.

I. The Adversarial Posture of Affirmative Action Challenges

A. *The Roots of Distortion*

Challenges to affirmative action plans are usually brought by whites and males[13] who do not directly benefit from the plan.[14] A distortion in the adversary process thus arises, because the parties to such a lawsuit—white male, his employer, and perhaps his union —have no incentive to ensure that the record of the case reflects a complete picture of possible past race and sex discrimination by the employer or union. In fact, it is in the interest of the employer and union to suppress such evidence, because any evidence made available to the court may be used by minorities and women in future lawsuits charging direct discrimination.[15] Attorneys for the white male have no interest in directing attention to the existence of past discrimination by the employer or union, because such past discrimination may legally justify the challenged affirmative action plan. When no party before the court has an incentive to bring forward evidence of discrimination, the court is unlikely to find present or past discrimination. Where existence of discrimination is an issue in the affirmative action challenge, the court's decision is therefore likely to be adverse to the minority

[13] It is assumed that most affirmative action plans are intended to benefit minorities and women, although they often also benefit whites and men. For example, the plan challenged in *Weber* was an apprenticeship training program that had never before been available to unskilled and semi-skilled Kaiser workers. Half the places in the program were, in effect, set aside for white males. Weber challenged only that portion of the program benefiting blacks.

There is also the possibility that a white female may challenge an affirmative action plan by charging race discrimination, or that a minority male may challenge a plan on the basis of sex discrimination. In such cases the litigant is unlikely to be a beneficiary of the affirmative action plan, and the distorted posture described here will still exist.

[14] Of course, all workers, white and minority, male and female, benefit indirectly from affirmative action insofar as it unites the employees by ending divisions along racial or sexual lines, enabling them to present a more solid front when bargaining with their employer. *See generally* Equality on the Job: A Working Person's Guide to Affirmative Action (published by the Affirmative Action Coalition, a project of La Raza Legal Alliance, the National Conference of Black Lawyers and the National Lawyers Guild).

[15] Moreover, once a court has entered an adverse finding of race or sex discrimination, the employer and union may be collaterally estopped from defending themselves against future charges of race or sex discrimination. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). *See generally* Restatement of Judgments §§ 45-48 (1942).

beneficiaries whose interests typically are not represented in the litigation.

While the Supreme Court's decision in *United Steelworkers v. Weber*[16] may be interpreted as undercutting the importance of proving past discrimination in affirmative action lawsuits,[17] it must be remembered that *Weber* was a narrow decision, addressing only "conspicuous racial imbalance in traditionally segregated job categories."[18] Thus, it remains unclear whether a voluntary affirmative action plan will be found lawful when the racial imbalance is not so conspicuous, or the job category is not traditionally segregated. What is the lawfulness, for example, of affirmative action in industries, such as the computer industry, that have greatly expanded since 1965? It may be very difficult to show "traditional segregation" in such relatively new job categories.[19] If proof of past discrimination is required in such a situation, the factual distortions resulting from the typical adversarial posture of affirmative action litigation will become crucial. Can the parties to an affirmative action challenge—white male, employer, and union—be expected to present the evidence needed to judge the lawfulness of

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[16] 443 U.S. 193 (1979).

[17] *See* note 12 *supra*. In Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3558-59 (U.S. Jan. 10, 1980) (No. 79-1080), the court was persuaded that the challenged affirmative action plan was lawful, in part because post-title VII discrimination had been demonstrated. The court also noted that the existence of pre-title VII discrimination, while not itself unlawful, may nevertheless be considered in a title VII challenge to an affirmative action plan. *Id.* 689.

[18] 443 U.S. at 209 (footnote omitted). *See* note 12 *supra*.

Recent cases have emphasized that *Weber* involved a voluntary, private affirmative action plan. *See, e.g.*, Carson v. American Brands, Inc., 606 F.2d 420, 430-31 (4th Cir. 1979) (Winter, J., dissenting); Brown v. New Haven Civil Serv. Bd., 474 F. Supp. 1256, 1263 (D. Conn. 1979). *But see* Drayton v. City of St. Petersburg, 477 F. Supp. 846, 861 (M.D. Fla. 1979) (*Weber* cited as authority for the proposition that a court-imposed racial hiring quota is an appropriate remedy).

Judge Gordon, the federal district judge who originally ruled in Weber's favor, has given the Supreme Court's decision an even narrower interpretation than the case seems to command: "The Supreme Court has recently held that an employer, under Title VII may even go so far, voluntarily, as to give job preference to blacks over whites, *although it may not be compelled to do so.*" Booth v. Board of Directors of Nat'l Am. Bank, 475 F. Supp. 638, 653 n.12 (E.D. La. 1979) (emphasis supplied).

[19] Moreover, it seems anomalous to require evidence of traditional segregation throughout a job category when specific evidence of past discrimination by the litigating employer or union is available. At least one court interpreting *Weber* has relied on evidence of specific discrimination to uphold a voluntary affirmative action plan where no evidence of traditional discrimination against the job category involved (security guards) was presented. Tangren v. Wackenhut Servs., Inc., 480 F. Supp. 539 (D. Nev. 1979).

affirmative action? *United Steelworkers v. Weber* suggests that this is an unrealistic expectation.

B. United Steelworkers v. Weber *and Issues of Fact*

In 1975, pursuant to the provisions of a 1974 collective bargaining agreement[20] between Kaiser Aluminum and Chemical Corporation and the United Steelworkers of America, Kaiser established a new apprenticeship training program at its Gramercy, Louisiana plant. The program opened to incumbent Kaiser employees a number of skilled-trades positions, which previously had been closed to them because of stringent experience requirements.[21] Under the new program, workers would be trained for a period of time for skilled-trades positions.[22] Entry into the program was to be on a one-for-one basis—one minority employee would be trained for each nonminority employee trained.[23] Selection within each class was based upon seniority relative to the other members of that class.[24] When two black employees with three months less seniority than Brian Weber[25] were accepted into the program, Weber, a white male, instituted a title VII lawsuit charging race discrimination.

The district court found Kaiser's apprenticeship training program unlawful on two alternative grounds. For one thing, Kaiser had instituted its plan without a court order. The district court contended that courts alone had the power under title VII to establish affirmative action programs; Kaiser's self-instituted program was therefore unlawful.[26] In addition, the court held that race-conscious affirmative action was permissible only in those circumstances "where the preferred workers were . . . identifiable victims of unlawful hiring discrimination and where in fact there had been . . . past discrimination by the employer."[27] Because the

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[20] The agreement provided that a joint labor-management committee would review minority representation in craft-level employment positions at the Gramercy plant and, if necessary, establish goals and time-tables in order to achieve a desired minority ratio. Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. at 763.

[21] Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d at 218.

[22] Appendix to Supreme Court Record at 67, United Steelworkers v. Weber, 443 U.S. 193 (1979) [hereinafter cited as Record].

[23] 415 F. Supp. at 763.

[24] 563 F.2d at 218.

[25] Record, *supra* note 22, at 157 (Joint Exhibit 3).

[26] 415 F. Supp. at 767-68.

[27] 563 F.2d at 223; 415 F. Supp. at 769.

trial court found that Kaiser had never discriminated,[28] the affirmative plan violated title VII's proscription of discrimination "against any individual." [29] On appeal, the Fifth Circuit took issue with the district court's ruling that voluntary, race-conscious affirmative action is unlawful unless court-imposed.[30] It affirmed the district court's decision for Weber on the second ground, however, holding that race-conscious affirmative action is permissible only to restore employees to the positions they would have occupied but for prior discrimination.[31] Quoting with approval the factual finding of the district court, Judge Gee, writing for a divided panel, based his decision on the resolution of a single factual issue:

> The evidence further established that *Kaiser had a no-discrimination hiring policy from the time its Gramercy plant opened in 1958, and that none of its black employees who were offered on-the-job training opportunities over more senior white employees pursuant to the 1974 Labor Agreement had been the subject of any prior employment discrimination by Kaiser.*[32]

Thus, although the "lack" of past discrimination by Kaiser formed the basis of the appellate court's decision in *Weber,* the record of the case shows that almost no attention was given to this issue during the trial. Indeed, none of the parties even attempted to show that Kaiser had discriminated in the past. The principal evidence relating to the existence or absence of discrimination by Kaiser consisted of testimony by the Kaiser-Gramercy Industrial Relations Superintendent. Under cross-examination by Weber's lawyer, he testified that Kaiser had not discriminated against minorities in the past,[33] and that Kaiser had, in fact, taken affirmative measures to attract minority applicants for skilled-trade positions.[34] This testimony was not questioned by lawyers for Kaiser or the

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[28] 415 F. Supp. at 764.

[29] Section 703(a) of title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

[30] 563 F.2d at 223.

[31] *Id.* 225.

[32] *Id.* 224 (quoting 415 F. Supp. at 764) (emphasis supplied by Fifth Circuit).

[33] Record, *supra* note 22, at 77-78. *But see* Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374 (5th Cir. 1978), *cert. denied,* 441 U.S. 968 (1979) (Kaiser found to have discriminated against minorities in a similar crafts program at another Louisiana plant).

[34] Record, *supra* note 22, at 76-77.

United Steelworkers, nor was it contradicted by the testimony of any other witness [35] or by any exhibit presented to the court.[36]

There was ample probative evidence available to anyone wanting to assert a contrary position.[37] No one presented it, however, leaving open the question of what the courts might have found had they been presented with evidence of discrimination. Two things, however, are clear. First, the proportion of minority workers hired by Kaiser-Gramercy was significantly lower than that existing outside the walls of the plant; for many years the Kaiser work force remained almost totally white in a community that was almost fifty percent black. Second, none of the parties in the *Weber* case wanted that fact examined by the courts during the litigation.

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[35] The other witnesses in the one-day trial were Brian Weber, who testified that Kaiser had never maintained discriminatory seniority lists, Record, *supra* note 22, at 35, Fortune Maurin (name misspelled as Moran in the transcript), another white Kaiser employee who testified concerning the effects of Kaiser's apprenticeship training program on himself; and Thomas Bouble, national director of Equal Opportunity Affairs for Kaiser, who testified that Kaiser needed race-conscious affirmative action to overcome the effects of societal discrimination. Record, *supra* note 22, at 90-104.

[36] The exhibits presented were:

Joint Exhibit A — Stipulation of the parties as to jurisdiction, Weber's status as an employee and union member, Kaiser's status as a corporation, the United Steelworkers of America status as a union, the 1974 agreement between Kaiser and the United Steelworkers, the operation of Kaiser employment practices as to skilled trades prior to 1974, the operation of the post-1974 apprenticeship selection process, the seniority status of the Kaiser employees who were selected for the program, the length of training and other advantages accruing to apprenticeship trainees, the lack of antidiscrimination laws in Louisiana and in Gramercy, and the authenticity and admissibility of the other exhibits.

Joint Exhibit 1 — Copy of the 1974 Labor Agreement.

Joint Exhibit 2 — Copy of the memorandum of understanding concerning operation of the apprenticeship training program.

Joint Exhibit 3 — Bid lists on each of the six training programs posted to the date of Weber's action.

Kaiser Exhibit 1 — Racial makeup of Kaiser-Gramercy craft families, February, 1975.

Kaiser Exhibit 2 — Characteristics of trainees selected by Kaiser-Gramercy pursuant to the 1974 program.

Kaiser Exhibit 3 — Kaiser-Gramercy craft employees, by trade and race, for 1972, 1973, and 1974.

Kaiser Exhibit 4 — Report letter, with attached chart, to the United Steelworkers of America and Kaiser Headquarters on operation of the 1974 program.

[37] *See* notes 41-71 *infra* & accompanying text.

The evidence of discrimination by Kaiser that could have been, but was not, introduced into the record was relevant to meet each of three general standards used by the Supreme Court to justify race- or gender-conscious affirmative action as a remedy in direct discrimination suits. First, affirmative action may be lawful if taken voluntarily and in good faith to remedy societal or institutionalized discrimination of some kind, discrimination that is not unlawful or that has occurred elsewhere than in the particular employment setting in question. This standard was partially adopted by the Supreme Court in *Weber,* but its applicability in other contexts has not been settled.[38] Second, affirmative action may be lawful when the employer is guilty of discrimination against a race or gender class under a disparate-impact standard such as the one applied in *Griggs v. Duke Power Co.*[39] Finally, race- or gender-conscious affirmative action may be lawful where the employer is guilty of intentional discrimination. This standard is similar to that used to judge whether unconstitutional discrimination exists under the due process clauses of the fifth and fourteenth amendments.[40]

1. Evidence Concerning Societal Discrimination

If it is true that Kaiser had a nondiscriminatory hiring policy from the time it opened in 1958, its hiring practices in the late 1950s and early 1960s were unusually enlightened ones for a company operating in rural Louisiana. Census figures show that in 1960, the unemployment rate for minorities in Louisiana was twice as great as that for whites, 9.5 percent versus 4.7 percent.[41] In 1959, the median income for white families in Louisiana was $5,288 per annum, while for minority families it was $2,238 per annum.[42] Over sixty-five percent of minority families in Louisiana had incomes below $3,000 annually, while less than twenty-five percent of white families had incomes that low.[43] In the two parishes where the Kaiser-Gramercy plant hired its workers, 797 of 4,587 minority workers in the labor force—17.4 percent—were unemployed, as compared with 297 of 5,243 white workers in the labor force—5.4 percent.[44]

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38 *See* notes 5-8 *supra* & accompanying text.

39 401 U.S. 424 (1971). *See* note 55 *infra.*

40 *See* Washington v. Davis, 426 U.S. 229 (1976).

41 U.S. BUREAU OF THE CENSUS, UNITED STATES CENSUS OF POPULATION: 1960 GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS, Louisiana 20-127 (1961).

42 *Id.* 20-136.

43 *Id.* 20-137.

44 *Id.* 20-197.

Some evidence of this societal discrimination was presented in the *Weber* litigation. A Kaiser official testified that the Kaiser-Gramercy plant had a five-year prior experience requirement for entry into skilled-trade jobs, which none of the minority workers or minority applicants could meet. He expressed a belief that most applicants possessing the requisite prior experience obtained it while working in the building trades, and that because of massive discrimination in that industry, minority workers were effectively excluded from obtaining the experience.[45] His theory apparently coincided with the theory of all parties in the cases, that Kaiser had instituted its affirmative action program to eliminate the racial imbalance in its skilled-trades work force caused by discrimination in other industries. The implausibility of Kaiser's other contention—that it had never discriminated, even in the 1950s and early 1960s when employment discrimination was pervasive in Louisiana[46]—was never challenged.

Both lower courts found that the proffered evidence was insufficient to justify Kaiser's affirmative action program, and it is unclear whether either court would have found the census data persuasive. Significantly, the Supreme Court reversed the lower courts, taking judicial notice of traditional segregation "on racial grounds."[47] Societal discrimination therefore appears to be sufficient, if not necessary, to uphold a voluntary affirmative action plan against a title VII challenge.[48]

2. Evidence Concerning Disparate Treatment of Minority Workers

In 1965, when the Civil Rights Act took effect,[49] minorities accounted for thirty-two of 681 Kaiser workers—4.7 percent.[50] At the same time, minorities accounted for approximately thirty-nine percent of the available labor pool.[51] This gross disparity between

[45] Record, *supra* note 22, at 63.

[46] *See* 443 U.S. at 212 (Blackmun, J., concurring).

[47] *Id.* 198 n.1.

[48] *See* note 19 *supra.*

[49] *See* § 716(a) of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 266 (1964) (declaring the effective date to be one year after the date of enactment).

[50] Summary, Atomic Energy Commission compliance review conducted at Kaiser Aluminum & Chemical Corp., Gramercy, Louisiana, on Nov. 16, 1970, at 2 (obtained from U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, Washington, D.C.), *also referred to in* Petition for Certiorari of the United States and the Equal Opportunity Commission at 18.

[51] Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d at 228 (Wisdom, J., dissenting).

the Kaiser work force and the local labor pool is not explained in the opinions of either the district court or the Fifth Circuit.[52] During the trial, no inquiry was made into the hiring practices which created this disparity,[53] although the disparity is precisely what led to the adoption of the apprenticeship training program which was challenged in the *Weber* litigation.[54] If Kaiser had hired a number of minority workers roughly corresponding to the percentage of minority workers in the local labor pool between 1958 and 1965, approximately thirty-nine percent of the most senior Kaiser-Gramercy employees in 1975 should have been minority workers. Because that was not the case, Kaiser had to select relatively junior minority employees in order to reach its goal of fifty percent minority participation in its crafts training program. The basis of Brian Weber's claim was that he and other white workers rejected for crafts training had plant seniority greater than that of black workers selected for the program. No one in the *Weber* case asked, and no one explained, however, why so few black workers had sufficient seniority to enter the program without the use of a quota. Instead, Kaiser merely contended that it had never discriminated, and both lower courts entered a finding of no discrimination.

Under the disparate-impact test announced in *Griggs v. Duke Power Co.*,[55] such a statistical disparity could be used by a party to require further examination by the court of Kaiser's hiring practices.[56] Hiring qualifications imposed by the plant that disqualified a greater percentage of minority workers than white workers would have to be shown by Kaiser to be related to job

[52] The lower courts were certainly aware of the disparity, however. While discussing the operation of Kaiser's apprenticeship selection, the Fifth Circuit commented: "As predictable, black employees have been admitted to Kaiser's on-the-job training program with less seniority than their white competitors." *Id.* 218. The predictability lies in the disparity between the racial composition of the Kaiser work force and the racial composition of the outside labor pool in the early years of the plant's operation—the years in which the white employees, later denied entry into the training program, were first hired.

[53] *See* notes 35 & 36 *supra* and text accompanying notes 33-36 *supra*.

[54] Another disparity noted by the district court was that prior to 1974 only five employees, approximately two percent of the skilled-trades work force, were minority workers. 415 F. Supp. at 764.

[55] 401 U.S. 424 (1971). Under the Supreme Court's standard in *Griggs*, a job qualification violates title VII if it has a disparate impact on minorities and is not related to job performance. *Id.* 431. Because the prior-experience requirement for skilled-trades positions excluded virtually all minorities and women, federal regulations required that Kaiser show that the prior experience was a business necessity. 41 C.F.R. § 60-3.3A (1979).

[56] For a discussion of the use of statistics in discrimination cases, see International Bhd. of Teamsters v. United States, 431 U.S. 324, 329 (1977).

performance, or Kaiser would be guilty of unlawful discrimination for any such practices existing after title VII took effect in 1965. Neither lower court made clear in its opinion whether only illegal, post-Act discrimination could justify affirmative action, or whether similar, lawful, pre-Act discrimination could also be a justification.[57] If the latter is true, imposing a *Griggs* test on Kaiser's practices from 1958 to 1965 would have cast serious doubt on Kaiser's contention that it had never discriminated.

More than mere employment statistics concerning plant-wide hiring was suppressed in *Weber*. Also missing from the record is documentation of federal-contract compliance investigations of the Kaiser-Gramercy plant. Under the authority of Executive Order 11,246,[58] which requires federal contractors to take affirmative measures to eliminate employment discrimination, and which also demands the insertion of nondiscrimination clauses in government contracts, investigators from the Atomic Energy Commission (AEC)[59] conducted compliance reviews of Kaiser's antidiscrimination efforts in 1970, 1973, 1975, and 1976.[60] After the 1970 review, the Chief of the Contract Compliance Office at the AEC wrote a letter to the Kaiser-Gramercy plant manager.[61] The letter referred to a prior agreement between the AEC and Kaiser to consider the minority population in the available labor force as comprising fifty percent of the total pool (pending adjustment upon completion of the 1970 census).[62] Noting that the level of minority employment at the Kaiser-Gramercy plant was approximately 9.9 percent,[63] the letter stated that Kaiser's minority hiring ratio of 16.9

[57] *See* note 17 *supra*.

[58] 30 Fed. Reg. 12,319 (1965), *as amended by* Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967), *and by* Exec. Order No. 12,086, 43 Fed. Reg. 46,501 (1978).

[59] The Atomic Energy Commission was abolished and its major responsibilities transferred to the newly established Nuclear Regulatory Commission in 1974. *See* 42 U.S.C. §§ 5814(a), 5841(f) (1976).

[60] Copies of documents summarizing these reviews may be obtained from U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, Washington, D.C.

[61] Letter from Guy W. McCarty, Chief, Contract Compliance Office, to J. W. Melancon, Plant Manager, Kaiser Aluminum & Chemical Corp., Gramercy, Louisiana (Jan. 25, 1971) (obtained from U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, Washington, D.C.) [hereinafter cited as McCarty Letter].

[62] *Id.*

[63] EEO Compliance Review Report, Part II—Employment by Race, Occupation and Sex (obtained from U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, Washington, D.C.). The text of the McCarty Letter, note 61 *supra*, indicates the level of minority employment to be 0.9 percent. This was obviously a typographical error in view of the statistics compiled in the EEO Report.

percent during the past year was "unsatisfactory" and ordered Kaiser to revise its Affirmative Action Compliance Program (AACP) within thirty days.[64]

An appendix to the letter listed specific deficiencies regarding Kaiser's violations of federal laws and regulations.[65] Several of these deficiencies related to the issue of disparate impact. First, of forty-nine professional employees at the plant, not one was a minority person. This was termed a "very unsatisfactory situation," and methods for recruiting minority professional employees were suggested. Second, affirmative action to identify and attract minority employees, required by federal regulations, had not been taken. The AEC further declared: "Over the years, jobs have been filled by non-minorities because suitable minority applicants were not in the pipeline or because they were not adequately considered." In addition, Kaiser had not effectively utilized available minority-recruiting sources. During the period from November 1, 1969 to October 31, 1970, forty-six new employees had been hired (exclusive of transfers and military returnees), of which eleven, or 23.9 percent, were minorities (nine, or 19.5 percent, were black). Of twenty-one new employees hired in EEO-1 categories (clerical and above), only two, or 9.5 percent, were black. Of the remaining twenty-five jobs, eight were in the skilled trades (none went to blacks), ten were semi-skilled positions (six, or sixty percent, went to black workers), and seven were laborer positions (one, or 14.2 percent, went to a black worker). Kaiser had not actively recruited at a local, predominantly black university, except when looking for professional employees. Finally, as of August 31, 1970, only one of Kaiser's 132 supervisors was a minority person. Kaiser had no plan to ensure that minority employees who aspired to supervisory positions had an equal opportunity to attain them. And, finally, of 246 craftsworkers at the plant, none was black. It was suggested that Kaiser establish a training program for crafts jobs and that future hiring into crafts positions "include at least the minority ratio that exists in the company's recruitment area."

All of the findings in this letter relate to illegal, post-Act discrimination. The letter documents the significant statistical disparities between the available labor pool and the minority work force at the plant, and strongly indicates that, prior to the challenged affirmative action plan, minority job applicants were not adequately considered for openings at the Kaiser plant.

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[64] McCarty Letter, *supra* note 61.

[65] *Id.*

In 1973, another AEC compliance-review officer informally visited the Kaiser-Gramercy plant. The officer's findings during the visit, detailed in an internal memorandum,[66] included five "serious" problems with Kaiser-Gramercy employment practices. Three of these problems relate to the issue of disparate impact. For one thing, a female clerical employee was terminated because of pregnancy, and was not rehired when she sought reemployment shortly after the termination. Second, Kaiser had not validated its experience requirements for direct hire or transfer to the skilled trades, although such validation was required by federal regulations.[67] Finally, Kaiser had transferred several white employees into the skilled trades who did not possess the prior experience ostensibly required of all transferees. No black employees had ever been given the same consideration.

This memorandum is particularly relevant to Kaiser's contention that it had never discriminated against minority employees. The company's practice of waiving its stringent prior-experience requirement for certain white employees, while requiring that all minority employees meet the requirement, casts serious doubt on the business necessity of the prior-experience requirement. This, taken together with the fact that Kaiser never validated the prior-experience requirement, raises serious questions of illegal race and sex discrimination. Like other documents indicating the existence of past discrimination by Kaiser, however, this memorandum was not introduced at the *Weber* trial.

The existence of these government findings casts a new light on the issues of the case. Both lower courts in *Weber* agreed that race-conscious affirmative action is permissible only to remedy discrimination occurring within the discrete employment setting to which the affirmative action plan applies.[68] Based upon a factual finding that Kaiser had never discriminated, each court then ruled against the company's voluntary affirmative action plan.[69] The existence of evidence that Kaiser had discriminated—recorded by a federal administrative agency[70] and certainly available to Kaiser

[66] Memorandum from Ben L. West, Facility Compliance Officer, Atomic Energy Comm'n (Jan. 31, 1973) (obtained from U.S. Dep't of Labor, Office of Federal Contracts Compliance Programs, Washington, D.C.) [hereinafter cited as West memorandum].

[67] *See* note 55 *supra.*

[68] *See* notes 27 & 31 *supra* & accompanying text.

[69] *See* notes 28 & 32 *supra* & accompanying text.

[70] See Justice Powell's opinion in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 300-05 (1978), for a discussion of the significance of government findings of past discrimination in an analogous setting.

—was not revealed to the lower courts, although the parties involved in the litigation believed that past discrimination was a relevant issue.

3. Evidence of Intentional Discrimination

The 1970 and 1973 contract compliance investigations [71] also uncovered evidence of intentional discrimination by Kaiser. The AEC found in 1970 that suitable minority applicants "were not in the pipeline or . . . they were not adequately considered." [72] The AEC's compliance review officer was also informed by several black employees that white union members "had actively discouraged Negroes from bidding on certain jobs and that white union members had been responsible for various other forms of intimidation at the plant." [73] Finally, one of the five "serious" problems with Kaiser-Gramercy employment practices uncovered by the AEC in 1973 was an incident in which a white employee had called a black plant guard by a racial epithet. Kaiser had taken no corrective action, although it was not the first incident of its kind.[74] While these findings alone do not establish the existence of intentional discrimination by Kaiser, they suggest that it existed and that other evidence might have been available to an interested party willing to investigate.

II. Compulsory Joinder of Minorities and Women in Title VII Affirmative Action Challenges

The failure of any party to introduce evidence of past discrimination in *United Steelworkers v. Weber* [75] can be explained by examining the incentives and disincentives operating for each party. For Weber, there were no incentives favoring introduction. Indeed, such evidence would have weakend his case. For Kaiser and the Steelworkers, introduction of such evidence would have strengthened their case against Weber, but would also have left them both vulnerable to lawsuits by women and minorities at the Gramercy plant if illegal race discrimination were found to have existed.[76] This dilemma was candidly acknowledged by the Steelworkers:

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[71] *See* note 60 *supra* & accompanying text.

[72] McCarty Letter, *supra* note 61.

[73] *Id.*

[74] West memorandum, *supra* note 66.

[75] 443 U.S. 193 (1979).

[76] *See* note 15 *supra* & accompanying text.

> [E]ven if employers and unions were quite convinced that they had violated Title VII, they would be unlikely to want to proclaim their own guilt. It is one thing to take prospective corrective action; it is quite another to make an admission which automatically entitles employees to recover backpay for past sins.[77]

The declaration by both lower courts hearing *Weber* that "Kaiser had a no-discrimination hiring policy from the time its Gramercy plant opened in 1958" [78] is therefore not surprising. This finding was compounded, however, by the Fifth Circuit's conclusion that none of the minority employees at Kaiser were even victims of societal discrimination: "Whatever other effects societal discrimination may have, it has had—by the specific finding of the court below—*no effect* on the seniority of any party here." [79]

Weber thus illustrates how the distorted adversarial posture of affirmative action challenges operates to exclude potentially critical evidence of discrimination and how modern courts focusing on recently occurring, discrete acts perpetrated by one party against another are unable to address the conditions of race and sex discrimination in society.[80] This situation could be remedied by joining other parties to affirmative action challenges who do have an interest in showing that discrimination has occurred. Those parties are the beneficiaries of affirmative action programs and the beneficiaries of any damages or injunctive relief which might result from a court finding of discrimination. Typically, these beneficiaries will be minorities and women.

Minority and women workers could become parties to affirmative action challenges under rule 24 of the Federal Rules of Civil

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[77] Brief for Defendant-Appellant at 16, 563 F.2d 216 (5th Cir. 1977), *rev'd*, 443 U.S. 193 (1979).

[78] 415 F. Supp. at 764, *quoted in* 563 F.2d at 224 (emphasis omitted).

[79] 563 F.2d at 226 (emphasis in original). Justice Rehnquist, in his *Weber* dissent, seized on this statement as rebutting the claim that minority workers at Kaiser were victims of societal discrimination. 443 U.S. at 225, n.6 (Rehnquist, J., dissenting). Of course, if minority workers at Kaiser were not discriminated against by the employer, and if their low seniority was not the result of societal discrimination, the gross disparities between the racial composition of the Kaiser work force and the racial composition of the surrounding labor pool must have been either mere coincidence or the result of some action or inaction by the minority workers themselves.

[80] For an interesting discussion of how antidiscrimination principles used in litigation actually further racial discrimination by focusing on discrete acts of discrimination rather than the social and economic conditions created by discrimination, see Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978).

Procedure, which allows for intervention,[81] or under rule 20, which concerns permissive joinder.[82] Both rules assume, however, some knowledge of legal rights and representation on the part of those who would become new parties to an action. This may not be an appropriate assumption.[83] Moreover, intervention and permissive joinder are designed to permit only those with an interest in vindicating specific rights to become parties in actions where those rights may be adjudicated. While minority and women workers certainly have a sufficient interest in affirmative action challenges to meet the tests for intervention and permissive joinder, the mere availability of such procedures may not be enough to ensure participation by the minorities or women in an affirmative action lawsuit. Particularly where it is likely, as in *Weber,* that certain effective defenses to the program may not be presented by the employer and union, affirmative action beneficiaries should be included as parties to ensure that the court is presented with all relevant evidence before it determines the validity of an affirmative action program.

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[81] Rule 24 provides for both mandatory and permissive intervention. FED. R. CIV. P. 24. A court must allow a person to intervene under rule 24(a), if he files a timely application claiming that he has an interest in the action, that disposition in his absence may impair his ability to protect his interest and that his interest is inadequately represented by existing parties. A court may permit a person to intervene under rule 24(b), if he files a timely application and his claim or defense has a question of law or fact in common with the main action.

Commentators have recently explored the feasibility of using rule 24 as the basis for minority participation in affirmative action challenges. *See* Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action,* 14 HARV. C.R.-C.L. L. REV. 32 (1979); Comment, *The Case for Minority Participation in Reverse Discrimination Litigation,* 67 CALIF. L. REV. 191 (1979).

[82] Rule 20 would permit minorities and women to be joined as defendants in an affirmative action challenge, but only if the plaintiff/challenger asserts a claim against them. FED. R. CIV. P. 20. It is very unlikely that challengers will voluntarily add parties who may strengthen the defense.

[83] Minority and women employees did in fact attempt to intervene in *Weber* but filed their motion only after oral arguments had been presented to the Supreme Court. Their motion requested "special leave to intervene" and "an order vacating the judgment below and remanding for a new trial with instructions to add intervenors as party defendants." Their tardiness in filing the motion was attributed to

> the omissions by the parties and the courts below, combined with the social realities in the Gramercy area. The discrimination in the plant and in the surrounding community which has denied applicants these positions in the plant are the same factors that have prevented applicants from acting sooner in this case. These factors permitted Black and women workers to learn only just recently that the key defenses of the affirmative action program had been suppressed. Furthermore, applicants' realistic fears of retaliation for speaking out against such discrimination . . . have impeded applicants and their class from aggressively pursuing this case at an earlier time.

Motion of Rudy Gorden, et al. For Special Leave to Intervene at 4. The motion was denied without comment. United Steelworkers v. Weber, 442 U.S. 927 (1979).

Thus, this Comment proposes that the courts should use their equitable and procedural powers to compel the joinder of minority and women workers as parties in affirmative action challenges. This can be accomplished in federal courts by compulsory joinder under rule 19 of the Federal Rules of Civil Procedure.[84] Two argu-

[84] Rule 19 is entitled "Joinder of Persons Needed for Just Adjudication." The full text of subdivision (a) is as follows:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

FED. R. CIV. P. 19(a). Persons joined under this subdivision are commonly called "necessary" parties. *See* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 124 (1967).

The full text of rule 19(b) provides:

> (b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

FED. R. CIV. P. 19(b). Persons who must be joined under this subdivision to avoid dismissal of the action are commonly called "indispensable" parties. *See* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 124 (1967).

Rule 19(b) is not a limitation on the powers of courts in the sense that a failure to join necessary or indispensable parties deprives a court of jurisdiction over the parties already before the court. Rather, the rule provides guidelines for the courts to determine whether, "in equity and good conscience," an action should proceed in the absence of certain interested parties. *Id.* 118-25. *See generally* Advisory Committee Notes, Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 89-90 (1966) [hereinafter cited as Advisory Committee Notes]; 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1611 (1972); Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961); Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327 (1957).

Because many compulsory joinder situations involve absent parties who may feasibly be joined, a party or a court may frequently raise the issue of failure to join without raising the specter of dismissal with prejudice. It is only when the absent party would defeat a court's diversity jurisdiction, could make a valid

ments will be examined: (1) that to continue the litigation without joinder would violate the due process rights of the minorities and women; and (2) that courts lack power to hear affirmative action challenges when the adversary process has been impaired by the absence of women and minority parties.

A. *Compulsory Joinder and Due Process*

No one may be deprived of life, liberty, or property without due process of law.[85] Hence, all persons with a liberty or property interest in a court proceeding must be joined as parties. This view finds support in a number of cases involving employment issues.

An indispensable-party theory was successfully used by several railroads in a dispute with two unions over diminishing jobs. In *Missouri-Kansas-Texas Railroad v. Brotherhood of Railway & Steamship Clerks*,[86] for example, the court attempted to settle a dispute between the Brotherhood of Railway Clerks and the railroad. The dispute arose when the railroad installed computers which eliminated much of the work that had previously been assigned to members of another union, the Order of Railroad Telegraphers. Under the terms of its collective bargaining agreement, the Telegraphers union claimed that its members were entitled to retain their positions with the railroad, and that its members should therefore operate the new computers. But, if the Telegraphers union members operated the computers, some members of the Clerks union would be displaced, and the Clerks union members were likewise protected by a collective bargaining agreement. As it became clear that the railroad intended to replace employees with computers, both unions moved to protect their memberships. Each union filed claims with the National Railroad Adjustment Board (NRAB). The NRAB treated each claim as a dispute between the railroad and the complaining union, not involving the other union. In two separate hearings before two separate referees, the NRAB entered orders in favor of both unions. Faced with

objection to venue, or is beyond service of process that the court must determine under rule 19(b) whether to proceed or dismiss the action. The Advisory Committee Notes make clear that the four considerations listed in rule 19(b) are not exclusive. Advisory Committee Notes, *supra*, at 92. *See generally* Hazard, *supra*; Reed, *supra*.

85 U.S. CONST. amends. V, XIV.

86 188 F.2d 302 (7th Cir. 1951). This case is but part of a long struggle involving the Telegraphers union, the Clerks union, and the railroads. For history of the legal battles, see Transportation-Communication Employees Union v. Union Pac. R.R., 385 U.S. 157, 158-60 (1966); Order of R.R. Telegraphers v. Union Pac. R.R., 349 F.2d 408, 409 (10th Cir. 1965).

presumptively valid orders compelling it to employ two persons in each of several jobs, the railroad sought and received an injunction against enforcement of the NRAB's orders, contending that the NRAB proceedings should not have been separate ones where they involved "rival" claims to the same jobs. The court granted the injunction, holding that the NRAB should have joined the Telegraphers in the proceeding involving the claim of the Clerks.[87]

In *Order of Railroad Telegraphers v. New Orleans, Texas, & Mexico Railway*[88] after a similar dispute had arisen, the Telegraphers sought and won an award of the disputed jobs from the NRAB, then sought enforcement of that award. The Fifth Circuit found the award to be invalid because the NRAB had given the Clerks neither notice nor opportunity to be heard. The court also held that the enforcement lawsuit itself could not proceed because of the Telegraphers' failure to join necessary parties—the Clerks union and the individual clerk whose job the Telegraphers sought. The court reasoned that it could not enter an order for enforcement of the NRAB's ruling without requiring the dismissal of a member of the Clerks. The court stated that the individual clerk's interest in his right to a job was "real and obvious" [89] and was sufficient to keep the court from hearing the enforcement suit without his presence as a party.

Union members used the indispensable-party theory to obtain dismissal of a suit in *McMurray v. Brotherhood of Railroad Trainmen.*[90] Two union locals, one in Ohio, the other in Pennsylvania, had carried a dispute over seniority rights in an interstate-railroad run to the highest tribunal of the union. When the dispute was decided in favor of the Ohio local, members of the Pennsylvania local asked a federal court to grant an injunction against enforce-

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[87] The court relied on "logic and reason" to construe an NRAB rule providing that the Board must give due notice of all hearings "to the employee or employees and the carrier or carriers involved in any disputes submitted." 188 F.2d at 306. After concluding as a matter of law that the Railway Labor Act did not require the NRAB to conduct separate hearings on the separate claims of the Clerks and Telegraphers, the court declared that the notice provision required the NRAB to join the Telegraphers in the claim of the Clerks. "We can think of no employee having a more vital interest in a dispute than one whose job is sought by another employee or group of employees." *Id.*

[88] 229 F.2d 59 (8th Cir.), *cert. denied*, 350 U.S. 997 (1956).

[89] *Id.* 67. *Accord*, Transportation-Communication Employees Union v. Union Pac. R.R., 385 U.S. 157 (1966) (NRAB must hear competing unions' claims in work-assignment dispute in one proceeding). *But see* Whitehouse v. Illinois Central R.R., 349 U.S. 366 (1955) (writ of mandamus to compel joinder of rival union denied where NRAB had not decided merits of case).

[90] 54 F.2d 923 (3d Cir. 1931). *Accord*, Hunter v. Atchison, T. & S.F. Ry., 171 F.2d 594 (7th Cir. 1948), *cert. denied*, 337 U.S. 916 (1949).

ment of the decision by the union. The court noted the contention of the plaintiffs that their seniority rights were property rights and dismissed the case on the grounds that necessary parties were absent—the Ohio local members who also claimed a right to the same property.

This line of cases demonstrates that an employee's interest in retaining his or her job can be sufficient to invoke compulsory joinder when that job is the subject of a court action. A corollary to the theory that compulsory joinder is an adjunct of due process, however, is the fact that if an interest does not rise to the level of life, liberty or property, it is insufficient to invoke compulsory joinder. A number of courts have held that the interest of employees in some employment opportunities is insufficient to invoke compulsory joinder. In *Eaton v. Courtaulds North America Inc.*,[91] for example, the defendant employer claimed that the plaintiffs, minority workers, had failed to join as parties the white workers who would be affected by an alteration in seniority. The employer argued that seniority rights are property rights and therefore protected by the fifth amendment from divestiture without due process. The court refused to acknowledge the legitimacy of that property right, stating: "[W]here the 'property' right is acquired by means of or because of some illegal activity (i.e., a discriminatory seniority system) the right is not vested and the court may alter it without the presence in court of those affected." [92] Similarly, in *Todd v. Joint Apprenticeship Committee of Steelworkers*,[93] the court held that the interest of illegally favored employees in continuing to benefit from their preferential treatment is insufficient to invoke compulsory joinder.

Eaton and *Todd* were decided in favor of the minority employees, but they may be a source of trouble to civil-rights advocates in the future. For one thing, confusion may result if employment rights are protected by a compulsory-joinder doctrine only to the extent that they are property rights. This approach may raise as many questions as it answers. Is the job protected by a contract? Is it a public job, and, if so, is it recognized in the employee's jurisdiction as a property right? [94] If the job is a property right,

[91] 5 Empl. Prac. Dec. ¶ 8,032 (S.D. Ala. 1972).

[92] *Id.* at 6,781.

[93] 223 F. Supp. 12 (N.D. Ill. 1963), *vacated as moot*, 332 F.2d 243 (7th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965).

[94] The Supreme Court has held that property interests in continued public employment "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

does that mean that the concomitant seniority is also a property right?

Second, the test used in *Eaton* and *Todd* is outcome-determinative. The courts in both cases reasoned that a right must be a legitimate property right to be protected by compulsory joinder, but each court had already decided that the interest asserted by the nonminorities was not a legitimate property right. By choosing to apply the "legitimate property right" test, each court had thus already determined that the defendant employer's motion to dismiss, on the grounds of failure to join necessary parties, would fail.

Under the *Eaton* approach, therefore, the beneficiaries of the Kaiser affirmative action plan would be subject to joinder only if it were first shown that their right to join the crafts training program was a "legitimate" right. Thus, they could be joined—but only after the court had in effect decided that the affirmative action plan was lawful. Under the *Missouri Railroad* approach, however, the beneficiaries would be subject to compulsory joinder simply because Brian Weber sought to displace them from their jobs.

A motion to dismiss for failure to join necessary or indispensable parties does not of itself assert the legitimacy of any right. It does challenge the power of a court to determine the legitimacy of a right without representation before the court for all who claim the right. The theory that compulsory joinder is an element of due process fails to recognize this difference and may therefore be an inadequate basis for assuring that beneficiaries of affirmative action plans will be compulsorily joined when such plans are challenged.[95]

B. *Compulsory Joinder and the Powers of Courts: An Alternative to the Due Process Theory*

Compulsory joinder involves not so much the vindication of a right as a limitation on the powers of courts.[96] A right must be asserted by someone with standing to assert it. The need for compulsory joinder, on the other hand, may be asserted by anyone; it may even be raised by a court sua sponte.[97] The ideology

[95] In Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 116-18 (1968), the Supreme Court explicitly rejected the lower court's contention that an absent necessary party has a substantive right to be joined in litigation under rule 19. Because the right to due process is a substantive right protecting specific, articulated interests in life, liberty or property, the Court's holding in *Patterson* is a further indication of the inadequacy of the due process argument.

[96] *See* note 84 *supra.*

[97] *See, e.g.*, Jett v. Zink, 362 F.2d 723, 726 (5th Cir.), *cert. denied*, 385 U.S. 987 (1966).

behind an adversary court proceeding is that the "true" facts and "correct" law will emerge when forceful advocates of differing sides air their arguments. When an issue to be adjudicated is one upon which the opposing sides actually agree, and the disagreeing side is not before the court, the adversary process ceases to function properly and it is necessary to bring in the disagreeing party.[98]

Compulsory joinder describes a limitation on the powers of courts that is much like subject-matter-jurisdiction limitations. Long before the Federal Rules of Civil Procedure were promulgated, the Supreme Court dismissed cases for failure to join necessary parties. For example, in a leading case, *Mallow v. Hinde*,[99] the Court refused to allow a decree for specific performance of a contract because the validity of that contract hinged upon a validity of another, conflicting contract, the parties to which were not before the Court. In dismissing the case, the Court stated:

> We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all Courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground that no Court can adjudicate directly upon a person's right, without the party being either actually or constructively before the Court.[100]

While rule 19(a) defines somewhat the degree of interest required to invoke compulsory joinder,[101] the Court's reasoning in *Mallow v. Hinde* suggests the basis for a fuller definition. First, the absent party must have an interest sufficient to pass standing requirements, if the absent party were to assert that interest in separate litigation; and second, the interest of the absent party must be unlikely to be asserted by any of the existent parties. Standing is, of course, the threshold requirement for any party to an action; in this instance, it would prevent those without a true interest in the litigation from becoming parties. The second requirement is suggested by the nature of the adversary system itself. Where the plaintiff and the defendant are not true adversaries concerning the issues to be litigated, compulsory joinder is needed to provide

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98 This is true only in courts that rely exclusively on adversary process. In other forums, such as family and juvenile courts, the court itself becomes a fact-finding instrument, cross-examining witnesses and taking responsibility for uncovering evidence that might not otherwise appear. The court thus becomes a substitute for missing adversaries in these limited situations.

99 25 U.S. (12 Wheat.) 193 (1827).

100 *Id.* 198.

101 *See* note 84 *supra* & accompanying text.

the adversaries necessary for a just determination of law and fact. These two requirements, though not an explicit part of rule 19, have frequently been behind the reasoning of courts granting or denying motions to dismiss for failure to join necessary parties in employment litigation.[102]

When neither adversely affected employees nor their unions have been named in litigation over jobs, courts have often required the joinder of both as parties. For example, in *Nix v. Spector Freight System, Inc.*,[103] a dispute arising from the merger of two companies and the consequent elimination of jobs, the court held that, where the plaintiffs sought jobs held by other employees, those employees and their union were necessary parties. In *Neal v. System Board of Adjustment*,[104] a race-discrimination charge brought under the provisions of the Railway Labor Act was dismissed for failure to exhaust administrative remedies, but the court also commented that the complaint had failed to join indispensable parties—the union and the adversely affected employees.[105]

When, on the other hand, adversely affected employees are not named in a complaint, but their union is, courts have often found that the employees are not necessary parties. In *Thompson v. New York Central Railroad*,[106] union members alleged that a contract signed by their union unfairly discriminated against them, because they had criticized the union's financial practices. The defendants moved for dismissal, arguing that plaintiffs had failed to join indispensable parties—the employees who would be affected by the requested relief. The court answered: "In the absence of a showing that the benefitted employees' interests are not the same as the defendant union's, the motion to bring in the employees as indispensable parties is denied."[107] The same motion was made with the same result in *Bowe v. Colgate-Palmolive Co.*,[108] a title VII action alleging sex discrimination. In denying the defendants' motion to dismiss for failure to join male employees, the court

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[102] *See, e.g.*, United States v. Navajo Freight Lines, 525 F.2d 1318 (9th Cir. 1975); United States v. Masonry Contractors Ass'n of Memphis, Inc., 497 F.2d 871, 875 (6th Cir. 1974); Le Beau v. Libby-Owens-Ford Co., 484 F.2d 798 (7th Cir. 1973).

[103] 264 F.2d 875 (3d Cir. 1959).

[104] 348 F.2d 722, 727-28 (8th Cir. 1965).

[105] *Id. Accord*, Bremer v. St. Louis S.W. R.R., 310 F. Supp. 1333, 1340 (E.D. Mo. 1969) (rule 19 requires joinder of union and male employee holding disputed job in sex discrimination suit).

[106] 250 F. Supp. 175 (S.D.N.Y.), *aff'd*, 361 F.2d 137 (2d Cir. 1966).

[107] 250 F. Supp. at 178.

[108] 416 F.2d 711 (7th Cir. 1969).

noted that the union was a party and had a duty to represent the absent male employees as well as female employees. The court added: "In fact, since a majority of the . . . employees were male, it is not unreasonable to assume that the officers of the Union were elected by a majority of male members and would, therefore, be responsive to their interests." [109]

Thus, when the interest of an absent party in vindicating employment rights is already represented by an existent party, joinder is not required. The mere presence of a union in a lawsuit, however, is not sufficient to ensure adequate representation of union members who benefit from the practices a plaintiff seeks to enjoin. In *Banks v. Seaboard Coast Line Railroad,*[110] for example, a minority employee sought retroactive seniority for himself and other minority employees. The employer moved to dismiss for failure to join white employees as indispensable parties. Noting that the requested relief would adversely affect white employees and that the union's duty of fair representation extends to all employees, the court ordered the white employees joined as necessary parties. Where the interests of groups of employees diverge, the court reasoned, the union cannot be an adequate representative of both.

Whether a union can adequately represent the interests of absent parties in title VII litigation was also considered in *English v. Seaboard Coast Line Railroad.*[111] There, the Fifth Circuit

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[109] *Id.* 719 n.8. *Accord,* United States v. St. Louis-S.F. Ry., 52 F.R.D. 276, 280 (E.D. Mo. 1971), *rev'd on other grounds,* 464 F.2d 301 (8th Cir. 1972), *cert. denied,* 409 U.S. 1107 (1973).

A line of cases arising from alleged race discrimination by the Teamsters union establishes a court's duty to ask whether the existing parties will protect the interests of all those with an interest in a case. In United States v. T.I.M.E.-D.C., Inc., 517 F.2d 299 (5th Cir. 1975), *vacated on other grounds sub nom.* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), the international union argued that union locals should be considered indispensable parties to the litigation, because collective bargaining agreements which the locals had negotiated were in question and because seniority rights arising out of those locally negotiated contracts gave individual union members an interest in the case which only the local unions could adequately represent. The court first concluded that the Teamster locals were necessary parties under rule 19(b) and should be joined if feasible. Because joinder was not feasible, however, the court then considered whether the locals were indispensable parties whose absence would compel dismissal under rule 19(b). Concluding that the international union could adequately represent the interests of the local unions and the employees whose seniority rights were in question, the court held that dismissal was unnecessary. *Id.* 310-11. *Accord,* United States v. East Texas Motor Freight Sys., 564 F.2d 179, 186 (5th Cir. 1977); United States v. Navajo Freight Lines, 525 F.2d 1318, 1322 (9th Cir. 1975); United States v. Pilot Freight Carriers, Inc., 54 F.R.D. 519 (M.D.N.C. 1972).

[110] 51 F.R.D. 304 (N.D. Ga. 1970).

[111] 465 F.2d 43 (5th Cir. 1972).

affirmed the lower court's ruling that white employees were necessary parties in a title VII action by minority employees. The court first declined to adopt an absolute rule that "in *all* circumstances in which the implementation of a remedy may conceivably affect the employment interests of white union members the District Court *must* find that the union alone does not adequately represent its white membership." [112] It then considered circumstances in which a union cannot adequately represent both minority and majority employees because a requested remedy might set up irreconciliable differences between those employees and concluded that even then rule 19 does not require joinder in every case. Citing school desegregation cases in which the interests of white students in attending neighborhood schools were not represented, the court stated that a union's representation of its membership is no different in principle than a school board's representation of its community. In both situations, defendants are asked to effect remedies "inimical to the traditional advantages of white persons having a vested interest in the status quo." [113] Because elimination of discrimination in employment often involves a more detailed and subjective accommodation of competing interests, however, a court may be justified in concluding that representation of adversely affected employees is "insurance that the ultimate goal of terminating discrimination is accomplished in the most equitable and least disruptive manner possible." [114]

Although rule 19 says nothing about adequacy of representation by existent parties, the *English* court nonetheless did consider the manner in which a court evaluates adequacy of representation when deciding a rule 19 motion. This case therefore suggests a way to distinguish earlier cases holding that adversely affected employees in title VII cases are not necessary or indispensable parties.[115] Where employers and unions have a financial interest in showing that past discrimination did not exist, and the existence or lack of existence of past discrimination is a key issue in an affirmative action challenge, minority and women employees arguably are necessary parties even though white and male employees would not be necessary parties if the case were a more traditional discrimination complaint. In affirmative action challenges brought by whites or males, minority and women workers have an interest in a court

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[112] *Id.* 46 (emphasis in original).

[113] *Id.* 47.

[114] *Id.*

[115] *See* text accompanying notes 91-93 *supra.*

finding of past discrimination, because that finding may be essential to their future employment. That interest is not shared by any existent party. In more traditional title VII actions brought by minorities or women, on the other hand, the absent white and male employees have an interest in a court finding of no past discrimination, but that interest is shared and represented by the employer and the union.[116]

CONCLUSION

United Steelworkers v. Weber[117] demonstrates how the distorted adversarial posture of title VII affirmative action challenges operates to exclude relevant evidence of discrimination from consideration by the courts. Because neither the challengers nor the defendant employers and unions have any incentive to present evidence of discrimination, courts are frequently forced to decide affirmative action challenges without knowledge of critical facts. This Comment has proposed that courts remedy the situation by using their procedural and equitable powers to compel the joinder of minority and women beneficiaries of challenged affirmative action plans.

It must be remembered, however, that failure to join necessary or indispensable parties is ordinarily a defense raised by defendants. In affirmative action challenges, defendant employers and unions have no greater interest in joining minority employees who may prove past discrimination than they have in proving the existence of past discrimination themselves. Without clear and well-known case law to compel courts to order joinder of absent minority and women employees in affirmative action challenges, that joinder is unlikely to occur. Civil rights groups are not likely to have the resources to seek intervention or raise joinder issues in many affirmative action challenges occurring around the country, and individual minority and women employees are probably incapable of asserting these issues on their own. Courts should therefore recognize the distortion inherent in affirmative action challenges and the necessity of joining affirmative action beneficiaries in such challenges to ensure presentation of all relevant evidence.

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[116] Nonminority employees do, however, have an interest in the remedy applied by a court where past discrimination is found to have existed. On that issue, those employees should be joined in some traditional title VII cases.

[117] 443 U.S. 193 (1979).